No. 89-1679

In The

Supreme Court of the United States

October Term, 1989

SUMMIT HEALTH, LTD., ET AL.,

Petitioners,

vs.

SIMON J. PINHAS, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a claim under Section 1 of the Sherman Act which fails to allege any nexus between the allegedly anticompetitive activity and interstate commerce nevertheless meets the jurisdictional requirements of the Sherman Act, as interpreted by this Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980)?

THE PARTIES

The parties before the court of appeals included Simon J. Pinhas, M.D., Summit Health, Ltd. Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Richard E. Posell, Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc.[1] Richard E. Posell and Peggy Farber were not parties to the antitrust claim, which is the only claim in the underlying action reinstated by the court of appeals, and the only claim upon which this petition is based. They therefore have no interest in the outcome of this review and are not petitioners herein.

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[1] The rule 28.1 list is contained in footnote 1 of the Petition for a Writ of Certiorari.

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The opinion of the court of appeals (printed in Appendix to the Petition for a Writ of Certiorari ("App. Pet."), at A-1) is reported at 894 F.2d 1024 (9th Cir. 1989).

JURISDICTION

The opinion of the court of appeals issued on July 26, 1989, and was amended and superseded on January 25, 1990. Petitions for rehearing were filed by all parties and were denied on January 25, 1990. (App. Pet. at A-1.) The Petition for a Writ of Certiorari was filed on April 24, 1990, and certiorari was granted on June 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

STATEMENT OF THE CASE

The First Amended Complaint, which frames the issues to be litigated in this action, asserts that a peer review action taken against a surgeon's medical staff privileges at Midway Hospital Medical Center, an acute

care hospital located in Los Angeles, California, was based on false charges of deficient quality of care, which were the product of an antitrust conspiracy.[2] It is alleged that the antitrust conspiracy by the hospital, its parent corporation, members of its medical staff, and its attorneys was motivated by a desire to retaliate against Dr. Pinhas for refusing to accept an allegedly "sham" contract to perform administrative and educational services at Midway. The First Amended Complaint does not contain any allegations that the challenged conduct occurred in or had any impact on interstate commerce. Instead, the sole interstate commerce allegations are that the plaintiff and each of the defendants are "engaged in interstate commerce." J.A. 2-6.

On October 9, 1987, the district court entered its order granting defendants' motion to dismiss the First Amended Complaint without leave to amend. J.A. 315. The Ninth Circuit reversed the order of the district court dismissing the antitrust claim. With respect to the Sherman Act jurisdictional issue, the circuit court held that the general allegations that the parties are "engaged in interstate commerce" were sufficient to invoke jurisdiction under Section 1 of the Sherman Act, even though Dr. Pinhas did not allege that the challenged conduct was in

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[2] The discipline imposed by the peer review action was determined to have been based on substantial evidence by the Superior Court of the State of California ruling upon Dr. Pinhas' Petition for a Writ of Mandate. Defendants hereby request that the Court take judicial notice, pursuant to FED. R. EVID. 201, of the superior court ruling, printed in App. Pet. at A-32. An appeal is now pending from the superior court ruling.

or affected interstate commerce, relying upon this Court's decision in *McLain v. Real Estate Board of New Orleans*. The NInth Circuit further held that the relevant test for establishing Sherman Act jurisdiction was whether the peer review process "in general" had any effect on interstate commerce, but did not require any allegation that it did. Instead, it stated, without any factual allegations as its basis, that it "can hardly be disputed" that the test would be met in this case because "[peer review] proceedings affect the entire staff at Midway and thus affect the Hospital's interstate commerce." App.Pet. A-19-20.

This Court granted the Petition for Certiorari to determine whether the allegations of the First Amended Complaint satisfy the jurisdictional requirements of the Sherman Act.

SUMMARY OF ARGUMENT

In determining whether there is an effect on interstate commerce sufficient to satisfy Sherman Act jurisdiction, this Court has consistently focused on the facts alleged in a complaint asserting a nexus between the challenged activity and interstate commerce, and not on the defendant's general business activities. That focus has required federal district courts to review Sherman Act jurisdiction issues on a case-by-case basis, seeking a practical application of the Sherman Act to the economic realities of the day. Accordingly, Sherman Act plaintiffs have been required to plead, and if controverted, to prove that the challenged conduct had a substantial effect on interstate commerce as a matter of practical economics.

To allow a plaintiff to state a claim under the Sherman Act on the bare allegation that the defendants have

been engaged in interstate commerce would effectively eliminate the jurisdictional requirements of the Sherman Act, since the general business activities of most professional and commercial concerns have some effect on interstate commerce. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947) (Sherman Act jurisdiction does not extend to activities which have only a "casual and incidental" relationship to interstate commerce).

Such an interpretation would also be inconsistent with this Court's historic interpretation of the Sherman Act, would unnecessarily add to the rising tide of litigation in the federal courts and would yield results contrary to the public policy of encouraging effective medical staff peer review. Participation in peer review, no matter how slight, would expose each of the participants to the threat of Sherman Act litigation, with its attendant threat of treble damages and attorneys' fees, even where the nexus with interstate commerce is remote, incidental, or nonexistent. Accordingly, the Ninth Circuit's Sherman Act jurisdiction holding should be reversed.

ARGUMENT

I. INVOCATION OF SHERMAN ACT JURISDICTION REQUIRES A CASE-BY-CASE ANALYSIS OF THE FACTUAL NEXUS BETWEEN THE ALLEGED RESTRAINT AND INTERSTATE COMMERCE

An analysis of whether jurisdiction exists under the Sherman Act is to be based upon an intensely practical, case-by-case review of the facts presented to determine

the actual factual relationship between the alleged restraint and interstate commerce. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-784 (1975) (examining the specific transactions in question and their connection to interstate commerce "in a practical sense"). A consistent line of cases examining Sherman Act jurisdictional requirements, focused on the specific facts presented in each case, has thus developed, beginning shortly after the Sherman Act's enactment, and continuing through to the present day.

The early cases exploring the jurisdictional scope of the Sherman Act focused on whether the challenged conduct was "in" interstate commerce. *See, e.g., Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 227 (1899); *Montague & Co. v. Lowry*, 193 U.S. 38, 48 (1904); *United States v. Patten*, 226 U.S. 525, 542 (1913). This test was later supplemented by an alternative test by which a plaintiff could establish Sherman Act jurisdiction by alleging a restraint which directly affected interstate commerce. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 544 (1935). Under either test, this Court's holdings on the subject of Sherman Act jurisdiction, from the inception of the Act, have been dependent upon finding a relationship between the alleged restraint and interstate commerce, and not on a generalized consideration of the business activities in which the defendants may engage. *See Addyston*, 175 U.S. at 235 ("[w]e are thus brought to the question whether the contract or combination proved in this case is one which is either a direct restraint or regulation of commerce among the several states . . . "); *Montague*, 193 U.S. at 48 (Sherman Act jurisdiction existed because "[t]he agreement directly

affected and restrained interstate commerce"); *Patten*, 226 U.S. at 543 (Sherman Act jurisdiction existed because "the conspiracy was to reach and bring within its dominating influence the entire cotton trade of the country"); *A.L.A. Schechter Poultry*, 295 U.S. at 544 ("[d]id the defendants' [challenged] transactions directly 'affect' interstate commerce so as to be subject to federal regulation?").

The factually oriented consideration of the alleged restraint and its particular relationship to interstate commerce established in these early cases has been reaffirmed consistently. Illustrative of the type of analysis required was that performed in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Construing allegations in the complaint, this Court considered whether a price-fixing arrangement among sugar refiners had a sufficient effect on interstate commerce to permit the invocation of Sherman Act jurisdiction. In reaching its conclusion, this Court conducted a detailed factual analysis of the effects of the alleged price-fixing of sugar beet purchases on the subsequent sale of sugar in interstate commerce, and concluded that "in the circumstances of this case" (*id.* at 242), the restraint could be shown to have a sufficient effect on interstate commerce to invoke Sherman Act jurisdiction. Had this Court limited its jurisdictional requirement to allegations relating only to the interstate activities of the defendants, such an analysis would have been unnecessary; there was never an issue whether the refiners sold their product in interstate commerce. *Id.* at 221. It was the interstate commerce effect of the restraint itself, as asserted in the factual allegations of the complaint, which decided the jurisdictional issue. *See also United States v. Women's Sportswear Ass'n.*, 336 U.S. 460, 464 (1949) (requiring that "[t]he business affected by the restraint is interstate commerce").

Nineteen years later, in *Burke v. Ford*, 389 U.S. 320 (1967), allegations by liquor retailers in Oklahoma that Oklahoma liquor wholesalers illegally divided the state into exclusive territories were also before this Court for a jurisdictional determination. The trial court dismissed the complaint for lack of proof of an effect on interstate commerce. This Court reversed, holding that the appropriate jurisdictional test was "well established" as whether the challenged activity is in or substantially affects interstate commerce. *Id.* at 321. Again, applying this test, the Court engaged in an economic analysis of the challenged activity and its relationship to interstate commerce as the key to finding Sherman Act jurisdiction.

In 1975 this Court again was confronted with the issue of whether a conspiracy had a sufficient nexus with interstate commerce to fall within the ambit of the Sherman Act. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the plaintiffs attempted to hire an attorney to conduct a title examination in connection with their prospective home purchase. They were unable to find an attorney in the county who would conduct the examination for less than a minimum fee "suggested" by the county bar association, and sued for violation of Section 1 of the Sherman Act. To determine whether there was a sufficient effect on interstate commerce, this Court examined "the transactions which created the need for the particular legal services in question" *id.* at 783-84, and their impact on interstate commerce:

> [g]iven the substantial volume of commerce involved, [footnote omitted] and the inseparability of this particular legal service from the

> interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected. See Montague & Co. v. Lowry, 193 U.S. 38, 45-46, 24 S. Ct. 307, 309, 48 L. Ed. 609 (1904); United States v. Women's Sportswear Assn., 336 U.S. 460, 464-465, 69 S. Ct. 714, 716, 93 L. Ed. 805 (1949).

Id. at 785. This Court therefore once again focused on the particular restraint alleged and the affected interstate commerce activity to determine whether the facts in that case created potential Sherman Act liability.

The following year, in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), this Court held that a complaint which alleged a conspiracy to prevent the expansion of a hospital and to monopolize hospital services in Raleigh, North Carolina, adequately alleged a substantial effect on interstate commerce flowing from the alleged restraint to state a claim under the Sherman Act. The corporate operator of a 49-bed hospital alleged that a competing hospital and others conspired to prevent it from relocating and expanding to 140 beds, and conspired to monopolize the business of providing hospital services in Raleigh. Examining the effect on interstate commerce which would result from "respondents' anticompetitive conduct" (*id.* at 741), this Court determined that a successful conspiracy would reduce the management fees paid to an out-of-state parent corporation and would eliminate the proposed multimillion dollar out-of-state financing for the expansion. These factors, combined with allegations that a successful conspiracy would adversely affect purchases of medicine and supplies from out of state and revenues from out-of-state insurance companies, satisfied the "effect on interstate commerce"

test. *Id.* at 744. Relying on its opinion in *Burke v. Ford*, this Court held that the relevant test was whether interstate commerce was affected by the alleged restraint "as a matter of practical economics." *Hospital Building Co.*, 425 U.S. at 745. Thus, the focus was on the practical economic effects of the conspiracy, not on the defendants' general business activities.

This Court's next and most recent examination of the jurisdictional requirements of the Sherman Act was in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), involving allegations that real estate brokers conspired to fix prices for the purchase and sale of residential real estate. *Id.* at 235. The complaint asserted that the defendants carried out the alleged conspiracy by fixing commissions for brokerage services at an artificially high level, "with the effect that the prices of residential properties have been artificially raised." *Id.* The brokerage services, for which it was alleged that fees were fixed, included obtaining financing and insurance from outside the state. *Id.*

Relying on the series of decisions discussed *supra*, this Court held that whether Sherman Act jurisdiction applied depended on whether the activities "infected" by a price-fixing conspiracy had a substantial effect on interstate commerce "as a matter of practical economics." *Id.* at 246 (*citing with approval Hospital Building Co., Goldfarb* and *Burke*). To reach its conclusion on that issue, this Court again critically examined the alleged restraint and its potential effects on interstate commerce, and concluded that the plaintiffs sufficiently identified a relevant aspect of interstate commerce which was substantially affected by the challenged activity. In so holding, this

Court noted that the plaintiff is required to identify "the relevant aspect of interstate commerce . . . ; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings. . . . " *Id.* at 242.

Accordingly, in *McLain* this Court continued the thrust of almost a century of decisions concerning antitrust jurisdiction requiring an allegation that the challenged activity either directly affected interstate commerce, or "infected" some otherwise local activity which has a substantial effect on an identified aspect of interstate commerce.

II. THE NINTH CIRCUIT'S INTERPRETATION OF *McLAIN V. REAL ESTATE BOARD OF NEW ORLEANS* IS INCONSISTENT WITH THIS COURT'S HOLDING AND THE PRECEDENTS UPON WHICH THAT HOLDING IS BASED.

To find Sherman Act jurisdiction, the Ninth Circuit read this Court's holding in *McLain* to require only that "as a matter of practical economics" the activities of defendants (referencing the peer review process in general) have a not insubstantial effect on interstate commerce. No factual relationship between the restraint alleged and interstate commerce was found to be required. Nor did the circuit court engage in any economic analysis of the practical economic effects on interstate commerce of the purported restraint. Instead, the court reached the unalleged and unfounded conclusion that peer review proceedings, in and of themselves,

"affect the entire staff" and "thus" affect interstate commerce. App. Pet. A-20. This holding was apparently based on the comment in *McLain* that a "particularized showing of an effect on interstate commerce caused by the alleged conspiracy . . . " is not required to establish the jurisdictional element of a Sherman Act violation. *Id.* at 242. This holding, however, results from an interpretation of *McLain* and the jurisdictional requirements of the Sherman Act which would for the first time eliminate the requirement that there be some relationship between the challenged activity and an effect on interstate commerce. Such an interpretation should be rejected.

Initially, the Ninth Circuit's interpretation ignores the "infected" activity analysis upon which the *McLain* ruling was actually based, *id.* at 246, and the Court's reliance upon cases, including *Hospital Building Co.*, *Goldfarb* and *Burke*, which each required a nexus between the alleged restraint and interstate commerce. Second, such an interpretation would render the factual analysis undertaken by this Court in *McLain* superfluous. That brokers assisted in securing financing and insurance from out of state would have been dispositive of the Sherman Act jurisdiction issue if the plaintiff need only assert that the defendant's general business or activity had some relationship with interstate commerce.

Third, such an interpretation ignores this Court's own elucidation of its comment, illuminated in the language and case citations that immediately follow it,[3]

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[3] Immediately following the comment, this Court explained: "The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction

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which demonstrate that the statement meant only that a "particularized" showing of an effect on interstate commerce (e.g., that the volume of goods moving in interstate commerce dropped by some amount) was not necessary at the jurisdictional stage. Otherwise a plaintiff would be required to show an *actual* effect, as opposed to an *intended* effect on interstate commerce to state a claim under the Sherman Act. *Id.* at 243.[4]

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required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. *See American Tobacco Co. v. United States*, 328 U.S. 781, 811, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, n. 59, 60 S. Ct. 811, 846, 84 L. Ed. 1129 (1940). A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436, n. 13, 98 S. Ct. 2864, 2873, 57 L. Ed. 2d 854 (1978); *see United States v. Container Corp.*, 393 U.S. 333, 337, 89 S. Ct. 510, 512, 21 L. Ed. 2d 526 (1969); *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 489, 70 S. Ct. 711, 714, 94 L. Ed. 1007 (1950); *United States v. Socony-Vacuum Oil Co., supra*, 310 U.S., at 224-225, n. 59, 60 S. Ct., at 844-846." *Id.* at 243.

[4] *See also* P. AREEDA AND H. HOVENKAMP, ANTITRUST LAW ¶232.1, at 238-39 (Supp. 1989) ("*McLain* language does not compel [an interpretation that the challenged conduct need not be linked to an interstate effect]. At most, it is ambiguous. The quoted dispensation was in the context of refusing to immunize ineffective price-fixing conspiracies. Elsewhere, the court made clear that there must be a nexus, at least 'as a matter of practical economics' between the challenged conduct and interstate commerce").

Thus, a large majority of circuit courts of appeal has concluded that the emphasis of the analysis in *McLain* is that a "particularized" showing of an effect on interstate commerce is not necessary at the jurisdictional stage, but that an allegation of the restraint's effect on interstate commerce is required. *See, e.g., Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723 (10th Cir. 1980) (*en banc*) ("[i]n other words, an elaborate analysis of interstate impact is not necessary at the jurisdictional stage, only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce. The emphasis of the statement was intended to be that a 'particularized' showing is not necessary, not that a showing of a nexus between unlawful conduct and effect is unnecessary.")[5]

Finally, elimination of the requirement of a nexus between the challenged conduct and interstate commerce

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[5] *See also Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-26 (2d Cir. 1983); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613-14 (6th Cir. 1986); *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411, 427 (7th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 (6th Cir. 1987); *Thompson v. Wise General Hosp.*, 707 F. Supp. 849, 855 (W.D. Va. 1989), *aff'd*, 896 F.2d 547 (4th Cir.), *petition for cert. filed*, 59 U.S.L.W. 3054 (U.S. Apr. 27, 1990) (No. 90-22). *Cf. Western Waste Serv. v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Although containing broad language, the opinion is consistent with this Court's historic analysis, in that it specifically focused its holding on the potential effects on interstate commerce of the challenged activity. The court noted that a substantial amount of purchases from

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would extend the reach of the Sherman Act to virtually every activity, no matter how local. There is no evidence that such an expansion is contemplated by the express language of the Act or was envisioned by Congress. This approach would undoubtedly magnify the already extraordinary volume of cases thrust upon the federal courts, where state court remedies for anticompetitive behavior already exist in virtually every jurisdiction. Graves, *Expanding Federal Antitrust Jurisdiction: A Close Look at McLain v. Real Estate Board, Inc.*, 19 HOUS. L. REV. 143, 168-169 (1981). Indeed, only three states do not have restraint of trade or monopolization statutes of general applicability. 13 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 132.01 (1989). As has often been recognized, "[s]ince every enterprise, however localized, inevitably has some effect, however remote, on the flow of commerce among the states, some 'localness', 'remoteness,' or 'de minimis' factor must intervene or federal regulation is boundless." *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 526 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); see also Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 632-33 (May, 1982) There has been no judicial finding, however, of a Congressional desire to use the Sherman Act to reach every restraint which could affect any commercial activity. *See, e.g., Huelsman v. Civic Center Corp.*, 873 F.2d 1171

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out of state, financing from out of state, payment of management and service fees to an out-of-state company, and remission of revenues to out-of-state sources "could reasonably be expected to fluctuate in direct proportion to Universal's success in conducting its alleged antitrust violations." *Id.* at 1099.

(8th Cir. 1989) (unemployed street vendors did not demonstrate the required nexus with interstate commerce); *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1123 (1989) (hospital's purchase of supplies from out of state and receipt of revenues from out-of-state public and private insurance programs are insufficient to establish Sherman Act jurisdictional requirements); *Daley v. St. Agnes Hospital*, 490 F. Supp. 1309 (E.D. Pa. 1985) (hospital firing of nurse supervisor has insufficient nexus with interstate commerce); *Hotel Phillips, Inc. v. Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961) (price fixing of local barber shops had an insufficient nexus with interstate commerce to invoke Sherman Act jurisdiction), *aff'd*, 301 F.2d 443 (8th Cir. 1962).

In conclusion, a complaint which fails to allege any practical economic relationship between a specified restraint and interstate commerce does not meet the jurisdictional requirements of the Sherman Act. Accordingly, the Ninth Circuit incorrectly determined that *McLain* eliminated the requirement of a practical economic analysis of the effects of the challenged conduct on interstate commerce to determine whether Sherman Act jurisdiction applies.

Iii. THE PUBLIC POLICIES ENCOURAGING PEER REVIEW COMPEL APPLICATION OF SHERMAN ACT JURISDICTION ONLY WHERE THE CHALLENGED CONDUCT HAS A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE

Hospital medical staff peer review consists of those processes designed to "resolve intraprofessionally

matters bearing upon a physician's competency and conduct." *Gill v. Mercy Hospital*, 199 Cal. App. 3d 889, 902, 245 Cal. Rptr. 304, *cert. denied*, 109 S. Ct. 227 (1988). Its goal is to assist in identifying and disciplining physicians who are incompetent or engage in unprofessional behavior. H.R. REP. No. 903, 99th Cong. 2nd Sess. 2, *reprinted in* 1986 U.S. CODE CONG. & AD. NEWS 6384, 6384.[6] Properly limited, it plays no essential or economic role in the practice of medicine. *Id.* at 3, 1986 U.S. CODE CONG. & AD. NEWS at 6385.

To encourage physicians to participate in effective peer review, Congress enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.*, providing qualified immunity to peer review participants. In the Act, Congress specifically found that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4)[7]

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[6] If California hospitals do not adequately screen and review competence of practitioners to whom they grant privileges, they may be liable for the negligence of such practitioners. *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982). In California, as a condition of receiving a license to operate, hospitals are required to establish peer review mechanisms. 22 Cal. Code of Regulations § 70703(b).

[7] Respondents are expected to argue that the enactment of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.*, summarily disposes of the issue of

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Although the facts underlying a specific peer review proceeding may compel a conclusion that it had a substantial effect on interstate commerce,[8] peer review, "in

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Sherman Act jurisdiction in this case, on the theory that Sherman Act jurisdiction is co-extensive with Congress' power to regulate conduct. This analysis is erroneous for two reasons. First, this Court has recognized that "the jurisdictional inquiry under . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974) (citations omitted). Second, the Health Care Quality Improvement Act of 1986 does not regulate peer review activity. Instead, if and when antitrust jurisdiction attaches, its purpose is to provide a shield to protect participants: "this legislation only defines the basis upon which immunity from damages will be granted with regard to professional review actions; where no immunity is claimed under this legislation, no standards regarding professional review actions are established by this legislation." H.R. REP. No. 903, 99th Cong. 2nd Sess. 13-14, *reprinted in* 1986 U.S. CODE CONG. & AD. NEWS 6384, 6395.

[8] *See, e.g., Patrick v. Burget*, 486 U.S. 94 (1988), *rev'g* 800 F.2d 1498 (9th Cir. 1986). Although the Sherman Act interstate commerce requirement was not analyzed in *Patrick*, the underlying fact situation involved a boycott by local physicians of the only general surgeon in a small city in Oregon. Emergency surgical patients were sent to hospitals outside the state instead of to the local general surgeon. 800 F.2d at 1502. If the district court in that case were required to consider the scope of Sherman Act jurisdiction based on the facts before it, the specific facts could well have resulted in a finding that the anticompetitive conduct had a substantial effect on interstate commerce.

general" (App. Pet. A-19) is not an economic activity.[9] Accordingly, there was no basis for the Ninth Circuit to conclude that the existence of peer review activity at a hospital was in and of itself sufficient to create Sherman Act jurisdiction. Such a conclusion is contrary to the view expressed by this Court in *Goldfarb* that although the examination by attorneys of a land title in exchange for money is "commerce" (421 U.S. at 787-88), "there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act" (*id.* at 785-86).[10]

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[9] In the legislative history of the Health Care Quality Improvement Act of 1986, Congress recognized that "[u]nlike other activities that may trigger antitrust lawsuits, properly limited peer review plays no essential or important economic role in the practice of medicine. Doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review." H.R. REP. No. 903, 99th Cong. 2nd Sess. 3, *reprinted in* 1986 U.S. CODE CONG. & AD., NEWS 6384, 6385.

[10] *Cf. National Soc. of Professional Eng'rs. v. U.S.*, 435 U.S. 679 (1978). In his concurring opinion, Justice Blackmun noted that: "there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering. A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of entrants. A bar association's regulation of the permissible forms of price advertising for non-routine legal services or limitation of in-person solicitation [citation omitted] may also have the effect of reducing price competition. In acknowledging that 'professional services may differ significantly from other business services' and that the 'nature of the competition of such services may vary,' *ante*, at 1367, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I

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Eliminating the jurisdictional requirement, so that the challenged activities need not have a substantial effect on interstate commerce, can only serve to increase unnecessarily the burgeoning number of cases brought by private physicians under the antitrust laws challenging peer review activity affecting their hospital staff privileges.[11] As the Seventh Circuit noted in *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985), elimination of the jurisdictional requirement "would mean that virtually every physician who is ever temporarily denied hospital privileges for whatever reason could drag the hospital and members of its staff into costly antitrust litigation merely by alleging that the defendant receives payments, goods, or equipment in interstate commerce." *Id.* at 1283-84. Creating Sherm... Act jurisdiction for any physician aggrieved in some respect by medical staff peer review, regardless of the effects on interstate commerce (*e.g.*, a physician who, as the result of peer review, is required to enroll in a continuing education course), would contravene the

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am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services." *Id.* at 700-01 (Blackmun, J., joined by Rehnquist, J., concurring in part).

[11] *See* Carlson, *Physician Credentialing Decisions and the Sherman Act*, 18 CUMB. L. REV. 419, 419 (1988) ("Physicians who are denied hospital privileges are increasingly turning to federal antitrust laws for relief"); Note, *Quality of Care, Staff Privileges, and Antitrust Law*, 64 U. DET. L. REV. 505, 506 (1987) ("antitrust litigation involving physician staff privileges has become a very active area"); Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. PA. L. REV. 121, 122 (1983) (to the same effect).

public policy of encouraging physicians to engage in effective peer review. In almost every case, physician plaintiffs will choose federal antitrust law over available state antitrust law and other remedies because of the threat of treble damages and attorneys' fees, in addition to the attractive prospect of avoiding state law discovery privileges and immunities imposed by the states in regulating their local peer review activities. If federal antitrust law is applicable to all phases of local peer review activity, "[w]hat then remains of state antitrust enforcement?" *Marston v. Ann Arbor Property Managers Ass'n.*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

Physician peer review, which seeks to ensure that physicians practicing in local hospitals adhere to the relevant community standard of care, is essential for the protection of patients and the public in general. To interpret Sherman Act jurisdictional requirements in a way which will tend to discourage any participation in peer review because of an unreasonable threat of Sherman Act liability, even where interstate commerce is not directly and substantially affected, contravenes public policy.

IV. CONCLUSION

The Ninth Circuit held that the allegations in the First Amended Complaint are sufficient to meet the jurisdictional requirements of the Sherman Act because: (1) the plaintiff need only prove that the peer review process in general has a not insubstantial effect on interstate

commerce[12]; and (2) all peer review proceedings affect the interstate commerce of Midway. This holding failed to require a nexus between the challenged activity and interstate commerce. It also failed to require any analysis of the economics of the activity under review, thereby substituting an unfounded factual presumption for the required practical, economic, fact-based analysis mandated by the Sherman Act.

The Ninth Circuit holding must be reversed, and the district court dismissal of the First Amended Complaint should be affirmed.

Respectfully Submitted this 10th day of August, 1990

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[12] The Ninth Circuit neither defined the peer review process "in general," or explained why it selected that activity, without any allegations or factual record, as the relevant activity.